No. (1)

Supreme Court, U.S.
FILED

98 1951 JUN 5 = 1999

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In The Supreme Court of the United States

EMMANUEL J. FOROGLOU,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petition for Writ of Certiorari

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the Petitioner has met his burden of proving his eligibility for asylum and withholding of deportation.

II. Whether the United States legal standards regarding the issue of conscientious objectors seeking asylum are unclear.

III. Whether the decisions below offend Foroglou's First Amendment rights of freedom and religion and conscience, as well as his right to a fundamentally fair hearing.

CERTIFICATE OF CORPORATE DISCLOSURE

Emmanuel Foroglou, Petitioner

Chief Judge Torruella, Senior Circuit Judge Coffin and Circuit Judge Boudin, of the Court of Appeals

Patricia Cole, Michael Heilman and Lauren Mathon. Members of the Board of Immigration Appeals

Thomas Ragno, Immigration Judge, Executive Office for Immigration Review

Paul Shearman Allen and Pauline M. Schwartz, Paul Shearman Allen & Associates, Counsel for the Petitioner

John McAdams, Jr., and Karen Ann Hunold, Office of Immigration Litigation, Department of Justice, for the Respondent

Frank Hunger, Assistant Attorney General, Civil Division, Department of Justice, for the Respondent

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit, Pet. App.1-8,[1] was entered and published on March 5, 1999. The opinions of the Board of Immigration Appeals (Pet. App. 9-13) and the immigration judge (C.A.R. 194-214)[2] are unpublished.

[1] "Pet. App." references are to the Appendices to the Petition.

[2] The transcript of the immigration judge's oral decision is located in the Certified Administrative Record ("C.A.R.") which is part of the Court of Appeals' record in this case.

JURISDICTION

The Court of Appeals entered its judgment on March 5, 1999. This petition is being filed within ninety days of that date. This Court has jurisdiction to review the First Circuits decision pursuant to 28 U.S.C. Sec. 1254(1).

STATUTORY PROVISIONS INVOLVED

8 U.S.C. section 1158(b), Immigration and Nationality Act Sec. 208(b):

(b) Conditions for Granting Asylum.

(1) In general. The Attorney General may grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the Attorney General under this section if the Attorney General determines that such alien is a refugee within the meaning of section 101(a)(42)(A).

8 U.S.C. section 1251(b)(3), Immigration and Nationality Act Sec. 241(b)(3):

(3) Restriction on removal to a country where alien's life or freedom would be threatened.

(A) In general. Notwithstanding paragraphs (1) and (2), the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion.

8 U.S.C. section 1101(a)(42)(A), Immigration Nationality Act Sec. 101(a)(42(A):

(42) The term "refugee" means:

(A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. . .

STATEMENT OF THE CASE

The Facts

Petitioner Emmanuel Foroglou, seeks review of the decision of the Court of Appeals, dismissing his claim for political asylum and withholding of deportation from his native Greece.

Mr. Foroglou is a believer in the philosophy of Objectivism espoused by 20th Century author and philosopher Ayn Rand. In accordance with these philosophical beliefs, he is staunchly opposed to compelled state service of any kind, particularly compulsory military service. Pet. App. 2. Greece has a mandatory military draft for males between the ages of 18 and 50. Pet. App. 2. According to Greek law, those who refuse military service and who are not granted "conscientious objector" status by the government are arrested and sent to prison. Those who are sent to prison for refusing military service are punished harshly and are imprisoned for a period of time longer than that of the required military service. See C.A.R. 474-475.

Mr. Foroglou was granted an educational deferment of his military service in 1980, but this deferment expired in 1990. Pet. App. 3. When he attempted to renew his Greek passport at the Greek consulate in the United States in 1994, the Greek officials refused, stating that he had to fulfill his military obligations. At that time, Mr. Foroglou notified the Greek

authorities by letter that he wished to be classified as a conscientious objector and that he would refuse to serve in the military if drafted. Pet. App. 3.

In 1998, a new Greek law on conscientious objectors became effective. This law provided for government recognition of certain persons as conscientious objectors, and the allowance of a civilian service option for such persons. The Greek law will not grant an exemption from military service for anyone who does not oppose the use of arms. Because Mr. Foroglou is not a pacifist, he would not be recognized as a conscientious objector under Greek law. Pet. App. 3.

The record shows that Mr. Foroglou would be jailed for refusing to serve in the military, and there is evidence in the record, both in the way of testimony and evidence from international human rights organizations, that those jailed for refusing to serve in the Greek military are punished in a manner disproportionate to their offense. See "5000 Years in Prison: Conscientious Objectors in Greece," Amnesty International, C.A.R. 479-486; "Amnesty International Reports on Human Rights Violations Around the World," 1992, 1993, C.A.R. 501-504; and "Greece: Torture and Ill Treatment," Amnesty International, 1992, C.A.R. 511-569.

While many of the jailed conscientious objectors in Greece refuse to serve on religious grounds, there are several documented cases of "total objectors," such as Foroglou, whose refusal is to mandatory state service of any kind. C.A.R. 59. [3] The record shows that these total objectors are imprisoned under harsh conditions. Moreover, the new Greek conscription law indicates that total objectors will be punished far

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[3] One example of a persecuted total objector, which was given in the proceedings below, is that of Nikos Maziotis, a non-religious total objector in Greece, similar to Foroglou. Maziotis was imprisoned twice in Greece for failing to serve in the military, in 1991 and 1992. He was released in 1993 only after going on a seven day hunger strike. C.A.R. 59-61.

disproportionately compared to religious objectors, who will be eligible for the civilian service alternative.

The Proceedings Below

Mr. Foroglou entered the United States in August 1993 on a student visa. Pet. App. 2. He earned a master's degree and a doctorate degree in economics from Brown University. He subsequently changed his immigration status to an H-1B visa, a temporary visa for professional workers. In this capacity, he taught as a college professor. He did not maintain this status and remained in the United States without authorization from the INS.

In 1993, Mr. Foroglou was placed into deportation proceedings, after coming to the attention of the Immigration and Naturalization Service. Pet. App. 2. He appeared before an immigration judge in Boston, where he admitted that he was deportable from the United States because he had not complied with the terms of his visa. However, he sought to remain in the United States, claiming eligibility for asylum and withholding of removal.

In September 1995, the immigration judge denied Mr. Foroglou's applications for asylum and withholding of deportation. Pet. App. 3. Mr. Foroglou appealed that decision to the Board of Immigration Appeals ("BIA" or "Board"). Before the BIA had decided his appeal, Foroglou filed a motion to remand and additional evidence along with it. Pet. App. 4. This motion included evidence of the new Greek conscription law.

The Board of Immigration Appeals dismissed Foroglou's appeal and motion to remand on April 30, 1998. The Board found that Foroglou "ha[d] not established that he would be punished or that any potential punishment could constitute persecution." Pet. App. 10. The Board also noted that the evidence submitted by Foroglou showed that mostly Jehovah's Witnesses were imprisoned by Greece for failing to serve in the

military, but that he was not a Jehovah's Witness. Pet. App. 11. Because of that, the Board found that Foroglou had not shown that he would be persecuted on account of any of the five characteristics protected by the Immigration and Nationality Act. Pet. App. 11.

Mr. Foroglou filed a timely petition for review of the Board's decision with the U.S. Court of Appeals for the First Circuit. Jurisdiction for the petition in the Court of Appeals was pursuant to former section 106 of the Immigration and Nationality Act, 8 U.S.C. Sec. 1105a. Following oral argument in January 1999, the Court of Appeals affirmed the judgment of the BIA in a decision published on March 5, 1999. Pet. App. 1-8.

The Court of Appeals concluded that Mr. Foroglou had not shown that he would be forced to serve in the military or disproportionately punished because he is an Objectivist. Pet. App. 5. The Court held that it did not constitute persecution, without more, for a country to refuse conscientious objector status to a bona fide conscientious objector. Pet. App. 6-7. The First Circuit also found that the new Greek conscription law (which provided a possible exemption from military service to pacifists) did not constitute persecution. Pet. App.7.

ARGUMENT

A. Foroglou Presented Sufficient Evidence to the Board of Immigration Appeals and the Court of Appeals to Prove that he Qualifies for Asylum

Emmanuel Foroglou qualifies for asylum because he has a well founded fear of persecution on account of his actual and imputed political opinion, and because of his membership in a

particular social group, the group of non-religious, total objectors to compelled military service in Greece.[4]

Foroglou's political opinion is grounded in the Objectivist philosophy which he espouses. This opinion is characterized by a fierce adherence to individual rights, along with a government which protects those rights and is responsible to its citizens. Foroglou's political opinion concerning the military draft in his country is expressed by Ayn Rand, the creator of Objectivism:

> "If the state may force a man to risk death or hideous maiming and crippling, in a war declared at the state's discretion, for a cause he may neither approve of nor even understand, if his consent is not required to send him into unspeakable martyrdom – then, in principle, all rights are negated in that state, and its government is not man's protector any longer. What else is there left to protect?" Ayn Rand, "The Wreckage of Consensus," appearing in Ayn Rand, "Capitalism: The Unknown Ideal," at 226 (1967), quoted in Foroglou's asylum application, C.A.R. 471.

The Court of Appeals has defined a social group as a group of individuals sharing a characteristic which is either beyond their power to change or which is "so fundamental to individual identity or conscience that it ought not to be required to be changed. Ananeh-Firempong v. INS, 766 F.2d 621, 626 (1st Cir. 1985). The Court of Appeals misidentified the social

[4] According to both U.S. and international law, an individual may qualify as a "refugee" if he is outside his native country and is unwilling or unable to return to such country "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. Sec. 1101(a)(42)(A).

group to which Foroglou belongs in Greece. The Court continuously referred to Foroglou as an "Objectivist" and required him to show that he be persecuted because he is an Objectivist. However, a more accurate description of his social group is, "the group of non-religious, total conscientious objectors in Greece who refuse to be drafted." This "social group" of non-religious conscientious objectors hold moral and/or philosophical beliefs regarding the military draft which are so fundamental that they ought not to be changed.

If the Court of Appeals had correctly identified Mr. Foroglou's political opinion and social group, it would have concluded that he certainly had demonstrated that he qualified for asylum on either basis. To be considered a refugee under U.S. law, an applicant must demonstrate a "well-founded fear of persecution" Both the BIA and the Supreme Court have set out a two-part test for this legal standard. First, the applicant must have a subjective fear of persecution. Second, that fear must be objectively "well-founded". The BIA has held that, "[a]n applicant for asylum has established a well-founded fear if he shows that a reasonable person in his circumstances would fear persecution." Matter of Mogharrabi, 19 I&N Dec. 439 (BIA 1987).

The Supreme Court has recognized that:

> [O]ne can certainly have a well-founded fear of an event happening when there is a less than 50% chance of the occurrence taking place. As one leading authority has pointed out:

> "Let us . . . presume that it is known that in the applicant's country of origin every tenth adult male person is either put to death or sent to some remote labor camp. . . In such a case it would be only too apparent that anyone who has managed to escape from the country in question will have a "well-founded fear of being persecuted" upon his eventual return." 1 A. Grahl-Madsen, The Status of Refugees in International Law 180 (1966). INS v. Cardoza-Fonseca, 480 U.S. 421, 431.(1987).

Thus, even if there is as little as a ten percent chance that a person would be persecuted, his fear would still be well-founded.

Courts have recognized that "an alien seeking asylum is often limited in the evidence he can obtain to show proof of political persecution." Artiga-Turcios v. INS, 829 F.2d 720, 723 (9th Cir. 1987). "Persecutors are hardly likely to provide their victims with affidavits attesting to their acts of persecution." Bolanos-Hernandez v. INS, 767 F.2d 1277, 1285 (9th Cir. 1984). Just as persecutors are unlikely to provide affidavits attesting to acts of persecution, so too are they unlikely to provide affidavits of direct evidence of their intent or motivation in threatening or persecuting an individual.

The Court of Appeals, just as the Board of Immigration Appeals, erroneously requires Foroglou to provide evidence that the Greek government would send him to jail and mistreat him because he is an Objectivist. Pet. App. 5. In the first instance, it is not likely that there are many Objectivists living in Greece, to whom Mr. Foroglou can be compared. It is clear that there are other non-religious conscientious objectors, as well as the more well-known Jehovah's Witnesses, who have been persecuted in Greece. In the second instance, as the Ninth Circuit realized, it is often difficult, if not impossible, to

provide direct evidence of the motivation behind a government's persecutory acts.

Contrary to the assertion of the Court of Appeals, Foroglou does not claim that he would be persecuted merely because he would be arrested or jailed for his refusal to serve. Instead, it is the treatment which Foroglou fears he would suffer, if he were arrested, which he fears. Foroglou does not dispute the notion that compulsory military service per se constitutes persecution. See Umanzor-Alvarado v. INS, 896 F.2d 14, 15 (1st Cir. 1990); Krastev v. INS, 101 F.3d 1213, 1217 (7th Cir. 1996). The Court of Appeals failed to recognize that there was uncontradicted evidence in the record of disproportionately severe punishment meted out to conscientious objectors in Greece, both religious and non-religious.

The granting of Foroglou's asylum claim would be in accordance with relevant Supreme Court precedent. In INS v. Elias-Zacarias, 502 U.S. 478 (1992), the Court considered a Guatemalan conscientious objector's claim for asylum, and decided that the applicant must present some direct or circumstantial evidence of the persecutor's motive. However, the Ninth Circuit, in a later case (Canas-Segovia v. INS, 970 F.2d 599 (9th Cir. 1992)), found that a conscientious objector could still qualify for asylum based on imputed political opinion.

The Court of Appeals failed to consider the contention made by Foroglou that the harsh treatment which he feared would constitute persecution on account of his political opinion. See Pet. App. 6. The lower court found:

> Nothing in the language of the federal definition of refugee (requiring persecution on one of the five enumerated grounds) suggests that it applies when a foreign country simply insists on universal military service for all citizens and provides no exemptions. In such a case, the resistor might refuse service out of religious or political conviction; but punishment for refusing to serve would not be "persecution" (even assuming the that term is apt) "on account of" the objector's religious or political opinion, see 8 U.S.C. §1101(a)(42)(A), but instead would be "because of his refusal to fight" for the government. INS v. Elias-Zacarias, 502 U.S. 478, 483 (1992). Pet. App. 6.

If Mr. Foroglou returns to Greece, he will refuse to participate in his country's mandatory military service. That fact is undisputed. There is thus a more than reasonable chance that he will be jailed. In accordance with evidence in the record (C.A.R. 479-486; 501-504; 511-569; 570-582, Amnesty International Reports regarding conditions in Greece), there is also a reasonable chance that if he is imprisoned, he would be mistreated, humiliated, and refused medical care. Id. Such treatment would constitute persecution Contrary to the findings of the Court of Appeals, such persecution would be "on account of" at least one of the five protected characteristics of the asylum statute – political opinion or membership in a social group.

Mr. Foroglou's refusal to submit to compelled military service is a political opinion. His refusal would not be simply, as the Court of Appeals stated, "because of his refusal to fight" for the government. See Pet. App. 6. Mr. Foroglou's political view is not that he refuses to fight for his government. He has admitted that he would not object to serving voluntarily in the Greek military. C.A.R. 471-472. As the Court of Appeals

pointed out, it is the involuntary nature of the service to which he objects. Pet. App. 2. His political opinion, then, is that he does not recognize the power of his government to compel his service in the military.

The First Circuit recognizes Amnesty International's belief that Jehovah's Witnesses are disproportionately punished in Greece. Pet. App. 5. The court seemingly did not find this relevant, because Foroglou is an atheist, not a Jehovah's Witness. However, it is relevant, for two reasons. First, there is evidence that both Jehovah's Witnesses and non-religious "total objectors" such as Foroglou are punished disproportionately. Second, there is evidence that the new Greek conscription law would recognize Jehovah's Witnesses, because they are pacifists, as valid conscientious objectors. See C.A.R. 24-27, Greek Conscription Law. If that is the case, an objector holding Foroglou's political opinions would be subjected to the same jail sentence and harsh treatment to which the Jehovah's Witnesses have been in the past. Fear of such treatment would qualify the individual for asylum.

The Court of Appeals decision contains fundamental factual and legal errors. The Court inexplicably refused to recognize evidence of the mistreatment of non-religious conscientious objectors in Greece, despite such proof in the record. While these objectors are fewer in number than the Jehovah's Witnesses, they certainly cannot be ignored. Because of the multitude of errors in the decision below, the Court should grant a writ of certiorari in this case. To refuse to issue the writ will result in the deportation of Mr. Foroglou to a country where he will face certain unduly harsh imprisonment and other treatment.

B. The United States Legal Standard on the Legal Issue of Conscientious Objectors Seeking Asylum is Unclear

Both the standard of U.S. law on this issue and the sources of law are unclear, therefore, Supreme Court review of this case is appropriate.

The treatment of this issue by the First Circuit differs from that of the Ninth Circuit. The Ninth Circuit thus would recognize the imputed political opinion doctrine in a case like this, while the First Circuit does not. Compare Canas-Segovia v. INS, 970 F.2d 599 (9th Cir. 1992) with the lower court decision in the instant case. The Ninth Circuit's second treatment of the Canas-Segovia case upheld the validity of the imputed political opinion doctrine, after the Supreme Court's decision in INS v. Elias-Zacarias, 502 U.S. 478 (1992). The First Circuit should have considered the applicability of the imputed political opinion doctrine to Foroglou's case, but it did not.

The First Circuit decision erroneously imposes the framework of U.S. domestic laws regarding its own military and conscientious objector recognition, while ignoring the guidance provided by international law sources.

The Supreme Court has recognized that the Handbook on Procedures and Criteria for Determining Refugee Status, published by the Office of the United Nations High Commissioner for Refugees, is an important international source for U.S. courts to utilize in deciding who qualifies as a refugee. INS v. Cardoza-Fonseca, 480 U.S. 421, 439, n.22 (1987). The First Circuit recognized this as well, in its opinion below, yet dismissed the importance of the UNHCR Handbook in this case, stating, "it is more helpful on some issues than others and cannot vary the explicit terms of the statute." Pet. App. 7, n.3.

Indeed, the Supreme Court recognized that the legislative history of the statutory refugee definition clearly illustrated that one of its primary purposes "was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees, 19 U.S.T. 6223, T.I.A.S. No. 6577. Cardoza-Fonseca at 436. The Supreme Court's usage of the UNHCR Handbook to interpret domestic asylum law shows that international sources are paramount tools of statutory interpretation for refugee issues.

In Cardoza-Fonseca, the Supreme Court relied upon language from the Handbook in interpreting the provisions of the law relating to the differing standards of proof required for asylum and withholding of deportation. The First Circuit should have followed the lead of this Court and interpreted the refugee statue more broadly, in accordance with the Handbook and the Refugee Protocol of 1967.

Contrary to the belief of the Court of Appeals, the invocation of the UNHCR Handbook in the instant case would not result in the modifying or expansion of the refugee statute, which, as the appellate court points out, is a matter left to the Congress. Instead, the weight of the UNHCR Handbook should be used to interpret the currently-existing law. Construing the refugee definition in accordance with the UNHCR's recommendation that conscientious objectors can be granted such status would not contradict or unduly expand this definition.

The Court of Appeals mistakenly compared the validity of Foroglou's conscientious objector status for asylum purposes with the U.S. draft laws. Citing Gillette v. United States, 401 U.S. 437 (1971), the Court pointed out that a U.S. conscription law requiring conscientious objectors to show an "absolute pacifist belief" was not unconstitutional. Pet. App. 8. While it might seem easy to compare a conscientious objector in Greece, seeking asylum in the U.S., to an individual seeking conscientious objector status under U.S. domestic law, such a comparison is not on point.

Forogolou has alleged that he will be persecuted not merely because he will be arrested, but because the punishment he fears will be disproportionately harsh in Greece. Therefore the issue of whether the U.S. would recognize an Objectivist as a conscientious objector is irrelevant.

The issue of applying U.S. as opposed to international standards has been treated differently by the different circuits. While, in the Ninth Circuit opinions, the court did not discuss U.S. draft laws, in the First Circuit, the court did. For example, in Canas-Segovia v. INS, 902 F.2d 717 (9th Cir. 1990) and its subsequent decision (Canas-Segovia v. INS, 970 F.2d 599 (9th Cir. 1992), the Court does not at any point compare the Salvadoran conscription laws to those of the United States. However, in the instant case, the First Circuit did just that. The court found, "Indeed, it is doubtful that the kinds of distinctions that Foroglou attributes to the 1997 law would be unconstitutional in this country. . . To describe as "persecution" a set of foreign-country exemption rules not at all different than out own is a view that would be hard to ascribe to Congress under any reading of the refugee statute." Pet. App. 8.

C. The Denial of Foroglou's Asylum Request Offends the First Amendment Rights of Freedom of Religion and Conscience

It is clearly evident from the decisions of the immigration judge, the Board of Immigration Appeals, and the Court of Appeals, that, had Mr. Foroglou given a religious basis for his refusal to serve in the Greek military, the result would have been different. Indeed, as the decisions of the courts below indicate, he would have been granted asylum. The record shows that Mr. Foroglou has been treated differently by our judicial system because of lack of religious beliefs.

The evidence shows that both Jehovah's Witnesses and non-religious objectors, such as Foroglou, have been jailed and harmed in Greece. Yet, despite the fact that this case has appeared before an administrative judge and two appellate bodies, nobody has recognized this fact. The immigration judge, as is demonstrated quite clearly in the transcript of the deportation hearing, recognized that Jehovah's Witnesses would be harmed, yet did not grant asylum to the petitioner, an atheist. The immigration judge's questioning of Foroglou's religious beliefs and quite overt contempt which he showed for Foroglou's atheism show unmistakable signs of bias. The immigration judge accused Foroglou, as an atheist, of lacking morality and conscience, of not believing in laws, and of advocating the "killing of babies." [5] The BIA did not even address the issue of bias by the immigration judge, and the Court of Appeals inexplicably dismissed it, stating that while the immigration judge "showed considerable disagreement with Foroglou's claims," this was evidence of mere "disagreement" and not bias. Pet. App. 8. [6]

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[5] The immigration judge criticized Foroglou for not believing in a "supreme being," as do Jehovah's Witnesses. He then asked Foroglou whether he, as an atheist, believed in "the rule of laws." After Foroglou responded that he did, the judge accused him, as an atheist, of believing in "only the laws that you want to believe in." C.A.R. 295-296. At another point in the hearing, the judge asked the completely irrelevant question of whether Foroglou "believed in abortion." When Foroglou stated that he was not opposed to abortion, the judge stated, "Sure. Because there's no guilt. Right?" He asked again, "As an atheist,. . . do you think abortion is right, killing babies?" C.A.R. 301-302.

[6] The extent of the immigration judge's bias may not have been fully appreciated by the Court below because his comments were directed to an atheist, and thus did not offend any recognized religion. Imagine, however, if Foroglou were, for example, Jewish, and the judge had stated, "I know that all of you Jews are immoral, and in favor of killing babies." Or, imagine if Foroglou were a Jehovah's Witness, and the judge had dismissed his claim, while remarking that he hated those people because of their efforts at proselitizing. Such comments clearly show bias, while the comments made to Foroglou were similarly offensive and demeaning.

Indeed, the statements made by the judge during the deportation hearing illustrate great prejudice against the petitioner. It can be certain, that, if a judge in a criminal trial made such comments to a defendant, a mistrial would be in order. While a deportation case obviously is not subject to the same standards as a criminal case, an alien is entitled to the protections of due process in deportation proceedings. The transcript indicates that the immigration judge was biased against Foroglou, based on his religious beliefs, to such an extent that the deportation hearing, and this the subsequent proceedings, were rendered fundamentally unfair.

Deportable aliens are accorded full due process and equal protection rights. Plyler v. Doe, 457 U.S. 202 (1982). The Plyler Court held that "the term `person' used in the fifth amendment is broad enough to include any and every human being within the jurisdiction of the republic.". Id. at 212. Accardi v. Shaughnessy, 347 U.S. 216 (1954). They similarly have First Amendment rights. Bridges v. Wixon, 326 U.S. 135, 161 (1945).

The conduct of the immigration judge during Foroglou's deportation hearing showed that he had a personal, rather than a judicial bias, rooted in an extrajudicial source (his personal opinions about athiests). See Matter of Exame,18 I&N Dec. 303 (BIA 1982. In addition, the hearing shows that the judge engaged in "pervasive bias and prejudice"against Foroglou. As such, he should have recused himself from the proceedings. The standards for disqualification are to be liberally applied. Liljeberg v. Health Services Acquisition Corp., 108 S.Ct. 2194 (1988); Hall v. SBA, 695 F.2d 175 (5th Cir. 1983).

The issue of the fairness of the initial deportation hearing is of paramount importance because of the great deference which the law accords to the decision of the immigration judge. While the BIA has the power to review legal conclusions by the immigration judge de novo, it exercises great deference to the judge's interpretation of the facts. Pet. App. 4, citing

Gebremichael v. INS, 10 F.3d 28, 34 (1st Cir. 1993). This can be seen as the decision of the BIA also erroneously concludes that Foroglou could not make out an asylum claim because he is not a Jehovah's Witness. Pet. App. 11.

The Court of Appeals, as discussed in its opinion, grants great deference to the factual conclusions of the administrative agency as well to the agency's application of legal standards to the facts. Pet. App. 4, citing Ravindran v. INS, 976 F.2d 754, 758 (1st Cir. 1992).

In Wooley v. Maynard, 430 U.S. 705 (1977), the Court upheld the rights of individuals to resist the state of New Hampshire's requirement that they display the state motto "Live Free or Die" on their license plates. The Court avoided ruling on the argument that the individuals' religious freedom was infringed by the requirement. Instead, the Court rested on the broader ground that compelling persons to serve as vehicles for views which they find abhorrent invades a protected sphere of intellect and spirit. It was not relevant whether the abhorrence stemmed from religious views or otherwise.

In a similar manner, it should not be relevant, in the adjudication of this asylum claim, what is the belief behind Foroglou's conscientious objection. To engage in such distinctions is to tread perilous waters, that is, to state that one religion or moral belief is more legitimate than another. Our Constitution is fundamentally opposed to such a reading of the law.

CONCLUSION

The petition should be granted.

Respectfully submitted,

Paul Shearman Allen*
Pauline M. Schwartz

Paul Shearman Allen & Associates
*Counsel of Record

June 3, 1999

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U.S. 1st Circuit Court of Appeals

FOROGLOU v INS

United States Court of Appeals
For the First Circuit

No. 98-1557

EMMANUEL J. FOROGLOU,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

ON PETITION FOR REVIEW OF AN ORDER OF
THE BOARD OF IMMIGRATION APPEALS

ENTERED: March 5, 1999

Before Torruella, Chief Judge, Coffin, Senior Circuit Judge, and Boudin, Circuit Judge.

Pauline M. Schwartz with whom Paul Shearman Allen & Associates was on brief for petitioner. John M. McAdams, Jr. with whom Frank W. Hunger, Assistant Attorney General, Department of Justice, Civil Division, and Karen Ann Hunold, Senior Litigation Counsel, Office of Immigration Litigation, were on brief for respondent.

BOUDIN, Circuit Judge. In this immigration appeal, the background facts are not disputed. Emmanuel J. Foroglou ("Foroglou"), a native and citizen of Greece, entered the United States on a student visa in August 1983, to pursue graduate studies in economics at Brown University. When he left Brown to teach at Utica University in 1987, his visa status was changed to H-1B, a non-immigrant professional visa. However, when Foroglou left his job at Utica in 1989 (and thus became ineligible for an H-1B visa), he did not inform the INS.

After working in Chicago for several years, Foroglou moved to Houlton, Maine. Shortly after he moved to Houlton, he came to the attention of the Immigration and Naturalization Service. In October 1993, Foroglou was served with an order to show cause why he should not be deported--the beginning of deportation proceedings. See 8 C.F.R. § 242.1 (1993). Foroglou did not dispute the facts as to entry and visa status but claimed refugee status based on his objections to the military draft laws of Greece. He has no family or relatives in the United States.

Shortly after entering the United States, Foroglou, professedly an atheist, began to develop a belief in Objectivism, a philosophy developed by the twentieth-century author Ayn Rand. He says that he now believes that the draft "negates man's fundamental right to life and established [sic] the fundamental principle of statism: that a man's life belongs to the state, and that the state may claim it by compelling him to sacrifice it in battle." Ayn Rand, Capitalism: The Unknown Ideal, 227 (1967) (quoted in Foroglou's application for asylum). Although he is opposed to any military draft, Foroglou is not opposed to war or fighting; his beliefs are only concerned with the fact that the draft is involuntary.

Based on the administrative record in this case, it appears that under Greek law, all males between the ages of 18 and 50 are subject to military service for 24 months. Since 1977, draftees may choose instead to serve, for twice

the usual amount of time, in non-combatant roles. In addition, in 1997, an alternative civilian service option was instituted for conscientious objectors; it is about 12-18 months longer than combatant military service, and Foroglou would probably not qualify for this alternative because he is not opposed to the use of weapons.

In 1980, Foroglou had received a 10-year student deferment of military service but he apparently did nothing in 1990 to renew it or to declare himself a conscientious objector. However, after the INS served its show cause order, Foroglou says that he wrote to the Greek Consulate in May 1994, to request a passport to replace the one being held by the INS and to declare himself a conscientious objector. The Greek consul responded that it could not issue Foroglou a passport until he had completed his military service and that Foroglou would have to deal with his local draft office (in Greece) about declaring himself a conscientious objector.

The first hearing on Foroglou's deportation was held on December 1, 1993, and thereafter continued so Foroglou could file applications for political asylum and suspension of deportation. See 8 U.S.C. §§ 1158, 1253(h). Foroglou filed these applications and also applied for voluntary departure in lieu of deportation, see 8 U.S.C. § 1254(e). Testimony, consistent with the facts described above, was completed on December 1, 1994. The hearing was reconvened again on September 6, 1995, and Foroglou moved to withdraw his application for suspension of deportation. The immigration judge granted his motion with prejudice and proceeded to present his decision.

In the decision, the immigration judge found that Foroglou had not established that he had a well-founded fear of persecution on account of his religion, race, nationality, membership in a particular social group, or political opinion if he were to return to Greece, or that any punishment for failing to comply with Greek conscription law would be disproportionately severe on account of any one of these factors. He denied Foroglou's application for asylum, but

granted Foroglou voluntary departure within 30 days in lieu of deportation.

Eight days later, Foroglou filed a notice of appeal with the Board of Immigration Appeals. In February 1998, before his appeal was heard, Foroglou filed with the Board additional evidence and a motion to remand to the immigration judge. The new evidence related to the new 1997 civilian service option and Foroglou's claim that he would not qualify for this alternative service. On April 30, 1998, the Board dismissed Foroglou's appeal, denied his motion to remand, and again granted him 30 days in which to voluntarily depart. Foroglou filed a petition for review with this court and moved for a stay of deportation, which was granted on May 21, 1998.

On this appeal, we begin with the Board's denial of Foroglou's application for political asylum. Its factual determinations are conclusive if "supported by reasonable, substantial and probative evidence on the record considered as a whole." 8 U.S.C. § 1105a(a)(4); see also Gebremichael v. INS, 10 F.3d 28, 34 (1st Cir. 1993). The Board's application of the legal standards to specific facts is also entitled to deference. See Ravindran v. INS, 976 F.2d 754, 758 (1st Cir. 1992). Abstract rulings of law are subject to de novo review. See Maldonado-Cruz v. INS, 883 F.2d 788, 791 (9th Cir. 1989).

The statute governing asylum, 8 U.S.C. § 1158(b), states that an alien can be granted asylum, in the discretion of the Attorney General, if the alien is a "refugee" within the meaning of 8 U.S.C. § 1101(a)(42)(A), namely, someone who is unable or unwilling to return to his home country because of "persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." The Attorney General does not resist review of the

Board's determination as to whether an applicant meets any of the five enumerated grounds.[1]

To qualify for asylum, the applicant must show that he actually fears persecution (a subjective issue), and that there is a "reasonable possibility" that persecution would actually occur (an objective issue), Ravindran, 976 F.2d at 758, but no more than this is required. See Cardoza-Fonseca, 480 U.S. at 430-32. If the applicant has shown no personal threat against him, he must show that there is a practice of persecution against a group or category of persons within the five enumerated grounds, and that he is identified with that group. See 8 C.F.R. § 208.13(b)(2)(i); Meguenine v. INS, 139 F.3d 25, 28 (1st Cir. 1998).

It is not persecution for a government to require military service of its citizens. See Krastev v. INS, 101 F.3d 1213, 1217 (7th Cir. 1996); see also Umanzor-Alvarado v. INS, 896 F.2d 14, 15 (1st Cir. 1990). However, a person may qualify as a refugee if he is singled out for service because he is a member of an enumerated group or if--when he refuses service--he is subject to disproportionate punishment on account of his group membership. See M.A. A26851062 v. INS, 899 F.2d 304, 312 (4th Cir. 1990)(en banc). Matter of R- -R--, 20 I. & N. Dec. 547, 551 (1992).

In this case, Greek law subjects all men to military service. There is no evidence that the Greek government has threatened Foroglou with military service because he is an Objectivist, nor is there any evidence that the Greek government targets Objectivists who refuse to serve for disproportionate punishment. According to Foroglou's submissions, Amnesty International apparently believes that the Greek government has disproportionately punished

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[1] The same five grounds can be made the subject of an application for mandatory withholding of deportation under 8 U.S.C. § 1253(h) (1995) (amended in 1996, and now covered by 8 C.F.R. § 208), but the burden of proof is greater and the relief less far reaching. See INS v. Cardoza-Fonseca, 480 U.S. 421, 430 (1987).

Jehovah's Witnesses who refuse the draft, but Foroglou is not a Jehovah's Witness.

Foroglou's main argument on this appeal is built on two related premises: first, that under the federal statutes, it is "persecution," without more, for a country to refuse conscientious-objector status to a bona fide conscientious objector and instead to punish the objector for refusing to serve; and second, that a belief in Objectivism is as good a basis for such conscientious-objector status as being a religious pacifist opposed to participating in war in any form. We once reserved judgment on the first premise, see Umanzor-Alvarado, 896 F.2d at 15, and now think the issue is resolved by later Supreme Court cases.

Nothing in the language of the federal definition of refugee (requiring persecution on one of the five enumerated grounds) suggests that it applies when a foreign country simply insists on universal military service for all citizens and provides no exemptions. In such a case, the resistor might refuse service out of religious or political conviction; but punishment for refusing to serve would not be "persecution" (even assuming the that term is apt) "on account of" the objector's religious or political opinion, see 8 U.S.C. § 1101(a)(42)(A), but instead would be "because of his refusal to fight" for the government. INS v. Elias-Zacarias, 502 U.S. 478, 483 (1992).

Some might think that refugee status should be offered to all persons fleeing from punishment for anything done "by reason of conscience," regardless of whether the "persecutor" singles out victims on account of their religion, political beliefs, or the like. However, this country itself makes criminal various refusals based on reasons of conscience,[2] so it is hard to imagine an immigration statute

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[2] This includes conscientious objectors who do not fall within the confines of the exemption statute, see Gillette v. United States, 401 U.S. 437, 461-62 (1971); people whose religion prohibits the payment of certain taxes, see United States v. Lee, 455 U.S. 252, 260 (1982);

being cast quite so broadly. In all events, the refugee definition enacted by Congress is limited to persecution "on account of" the enumerated grounds, and it is for Congress--not the courts--to enlarge it. It is quite true that the Ninth Circuit once took the opposite view in Canas-Segovia v. INS, 902 F.2d 717, 725-26 (9th Cir. 1990) (Canas-Segovia I), relying in part upon a U.N. "handbook" on refugee matters; but its decision was vacated by the Supreme Court, INS v. Canas-Segovia, 502 U.S. 1086 (1992). Nor does it matter that the U.N. advises that it is "open [to states] to grant refugee status" to conscientious objectors[3] It is open to Congress to adopt that course, but it has not done so here. Foroglou's argument thus founders on its first premise, and we need not address the merits of his second--namely, that Objectivism should be equated with traditional conscientious objector status.

A different issue is raised by Foroglou's motion to remand. Pointing to Greece's new 1997 law providing for non-military alternative service, he says that conventionally religious objectors would qualify but Objectivists would not. Why this should matter to Foroglou is not clear, since his objection is to any compelled service by the state. In any event, we do not believe that providing religious objectors an exemption constitutes persecution of all other non-exempted Greek citizens.

The asylum statute does not inflict on foreign governments the obligation to construct to their own draft

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individuals who refuse to be vaccinated, see Jacobson v. Massachusetts, 197 U.S. 11, 26-27 (1905).

[3] Office of the United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status § 173 at 40-41 (1979). The Handbook was earlier described by the Supreme Court as giving "guidance" in construing the statute, Cardoza-Fonseca, 480 U.S. at 439, n.22, but it is more helpful on some issues than others and cannot vary the explicit terms of the statute. The Handbook itself makes clear that it does not purport to be construing particular statutes of individual states. See Handbook, preface (ii), (vii).

laws to conform to this nation's own highly complex equal protection jurisprudence. Indeed, it is doubtful that the kinds of distinctions that Foroglou attributes to the 1997 law would be unconstitutional in this country, if Congress chose to draw them. See Gillette, 401 U.S. at 446-48 (requiring absolute pacifist belief does not run afoul of equal protection concerns). To describe as "persecution" a set of foreign-country exemption rules not all that different than our own is a view that would be hard to ascribe to Congress under any reading of the refugee statute.

Foroglou's remaining arguments need only the briefest mention. The Ninth Circuit's decision on remand in Canas-Segovia, although cited by Foroglou, is not on point.[4] It is beside the point whether Foroglou will be punished for draft evasion in Greece, so long as it is routine punishment that would be inflicted on any evader. Finally, we agree that the immigration judge showed considerable annoyance with Foroglou's claims, but disagreement with Foroglou's arguments is not proof of bias.

Affirmed.

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[4] On remand, the Ninth Circuit conceded that its earlier rationale was no longer valid but concluded that the government would in fact impute a political position to the asylum applicant and punish him severely on that account. Canas-Segovia v. INS, 970 F.2d 599, 601-02 (9th Cir. 1992). See also Canas-Segovia I, 902 F.2d at 728.

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041
Decision of the Board of Immigration Appeals

File: A29 856 181 - Boston

In re: EMMANUEL JAFIRIOS FOROGLOU

IN DEPORTATION PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT:
Paul Shearman Allen, Esquire
Paul Shearman Allen & Associates, Inc.
1329 18th Street, N.W.
Washington, D.C. 20036

CHARGE:

Order: Sec. 241 (a)(1)(C)(i), I & N Act [U.S.C. § 1251 (a)(1)(C)(i)] - Nonimmigrant - failed to comply with conditions of status

APPLICATION: Asylum; withholding of deportation; suspension of deportation; voluntary departure

We take the jurisdiction over this appeal on certification pursuant to 8 C.F.R. §3.1(c) (1997). The respondent's request for oral argument is denied. See 8 C.F.R. § 3.1 (e). On appeal, the respondent contests the denial of his claims to asylum and withholding of deportation under sections 208 and 243 (h), respectfully, of the Immigration and Nationality Act, 8 U.S.C. § § 1158 and

1253 (h). On February 4, 1998, the respondent filed a motion to remand the matter to the Immigration Judge, contending that the enactment of new laws in Greece regarding conscientious objectors would affect the respondent's eligibility for asylum and withholding of deportation. The Service did not respond to the respondent's motion. We will deny the respondent's motion and dismiss the appeal.

On appeal, the respondent argues that the Immigration Judge erred in finding that the respondent did not establish a well-founded fear of persecution. The respondent argues that contrary to the Immigration Judge's finding, the respondent had notified the Greek Government of his conscientious objector status. He further argues that he has shown that he will be punished as a result of his failure to complete military service, and that his punishment will be disproportionately severe. We find that the Immigration Judge's resolution of this issue was correct, and we will dismiss the appeal.

The respondent argues that the Immigration Judge ignored the fact that he had informed the Greek Government of his conscientious objector status. However, we note that the Immigration Judge acknowledged the respondent's testimony regarding the request he allegedly made to the Greek Government to be considered a conscientious objector on May 4, 1999 (I.J. at 13). Rather than interpreting the response which the respondent received from the Greek Consul (Exh. 5) as actual confirmation that the respondent had, in fact, registered as a conscientious objector, the Immigration judge interpreted this response as a means of providing information about how to register as a conscientious objector and the consequences of registering as such (Tr. at 69).

Regardless, even if the Immigration Judge's interpretation of the letter was incorrect, the respondent has not established that he would be punished or that any potential punishment could constitute persecution. A

government does not engage in persecution when it requires its citizens to perform military service. Umanzor-Alvarado v. INS, 896 F.2d 14 (1st Cir. 1990). We have held that draft evasion does not give rise to a well-founded fear of persecution unless the failure to serve in the military would result in disproportionately severe punishment on account of one of the five enumerated grounds in section 101 (a)(42) of the Act, or where the alien would be required to engage in inhuman conduct. Matter of R-R-, 20 I&N Dec. 547 (BIA 1992); Matter of A-G-, 19 I&N Dec. 502 (BIA 1987).

The respondent contends that he will be disproportionately punished for being a conscientious objector and thus has a well-founded fear of persecution. To support this contention, he submitted a number of human rights reports to the Immigration Judge. See generally Group Exhibit 3. Although Amnesty International criticizes the Greek Government's treatment of conscientious objectors in these reports, they recognize that the Greek Government predominately tends to imprison only Jehovah's Witnesses under this law. See Amnesty International, Greece -. 5,000 years of prison: conscientious objectors in Greece, AI Index: EUR 25/07/9, AT 4 (March 1993) (Group Exhibit 3(C)); Amnesty International, AI Concerns in Europe: November 1990- April 1991, AI Index: EUR 01/01/91, at 16 (June 1991) (Group Exhibit 3 (J)). The respondent is not a Jehovah's Witness. Rather, he has admitted that he is an atheist who bases his objection to conscripted military service on the writings of Ayn Rand and the philosophy of objectivism. Accordingly, we find that he respondent has failed to establish that he will be disproportionately punished on account of one of the statutorily protected grounds.

Moreover, we do not find that the evidence submitted by the respondent with his motion to remand supports his contention that he will be disproportionately punished. In his brief on appeal, the respondent, through counsel, asserts that he will be disproportionately punished, because his only

choice is imprisonment or the non-combat military service alternative which violates his beliefs. Respondent's Brief at 13. Even if we were to find that this constitutes disproportionate punishment which could be classified as persecution, the new Greek law creates an alternative civilian service. Law No. 2510/97, Art. 4 (Respondent's Motion (B)). Furthermore, contrary to the respondent's assertions, the mere fact that the required period of alternative service is longer than the required period of military service does not constitute disproportionate punishment. A government has the right to require military service of its citizens and to establish the requirements for such military service. See Matter of A-G, supra. Accordingly, we find that the respondent has failed to establish a well-founded fear of persecution through the submission of this new evidence. Therefore, remand of this matter to the Immigration Judge is not appropriate.

We agree with the Immigration Judge's conclusion that the respondent failed to establish that he will be disproportionately punished on account of one of the statutorily protected grounds for refusing to serve in the military. Additionally the respondent neither asserted that he would be forced to engage in inhuman conduct in the military nor submitted evidence supporting such an assertion. Accordingly, we agree that the respondent has failed to establish a well-founded fear of persecution. See Matter of R-R-, supra. See also INS v. Elias-Zacarias, 502 U.S. 478 (1992); Matter of S-M-J-, Interim Decision 3300 (BIA 1997).

Inasmuch as the respondent's evidence fails to establish the well-founded fear of persecution required for asylum, his evidence necessarily fails to establish the higher standard of a clear probability of persecution required to obtain withholding of deportation under section 243(h) of the Act. See INS v. Cardoza-Fonseca, 480 U.S. 421 (1987). Therefore, his appeal from the denial of his applications for asylum and withholding of deportation will be dismissed.

ORDER: The respondent's motion to remand is denied

FURTHER ORDER: The appeal is dismissed.

FURTHER ORDER: Pursuant to the Immigration Judge's order and in accordance with our decision in Matter of Chouliaris, 16 I&N Dec. 168 (BIA 1977), the respondent is permitted to depart from the United States voluntarily within 30 days from the date of this order or any extension beyond that time as may be granted by the district director; and in the event of failure so to depart, the respondent shall be deported as provided in the Immigration Judge's order.

\s\ _____
FOR THE BOARD

Supreme Court, U.S.
FILED
AUG 6 1999
OFFICE OF THE CLERK

No. 98-1951

In the Supreme Court of the United States

EMMANUEL J. FOROGLOU, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether substantial evidence supports the Board of Immigration Appeals' denial of asylum and withholding of deportation to petitioner, who opposes on philosophical grounds his government's universal, compulsory military service requirement.

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In the Supreme Court of the United States

No. 98-1951

EMMANUEL J. FOROGLOU, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-8) is reported at 170 F.3d 68. The decision and order of the Board of Immigration Appeals (Pet. App. 9-13) and the decision and order of the immigration judge are unreported.[1]

JURISDICTION

The court of appeals entered its judgment on March 5, 1999. The petition for a writ of certiorari was filed on June 3, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] We have lodged a copy of the decision and order of the immigration judge, which is not included in the appendix to the certiorari petition, with the clerk of this Court.

STATEMENT

1. The Immigration and Nationality Act of 1952 (INA), 8 U.S.C. 1101 *et seq.*, as amended by the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, provides that an alien will be considered a "refugee" if he "is unable or unwilling to return to" his home "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42)(A) (1994 & Supp. III 1997). If the "Attorney General determines" that an alien qualifies as a refugee, the Attorney General may grant that person asylum in the United States, 8 U.S.C. 1158(a) (1994). An alien claiming eligibility for asylum need only demonstrate a reasonable fear or risk of persecution. See *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 430-441 (1987). The alien bears the burden of proving that he is a refugee because he has the requisite well-founded fear of persecution. 8 C.F.R. 208.13(a). Once an alien has established his eligibility for asylum, the decision to grant or deny asylum falls within "the discretion of the Attorney General." 8 U.S.C. 1158(a).[2]

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[2] Section 604 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, Tit. VI, Subtit. A, 110 Stat. 3009-690, significantly revised the INA's asylum provision. That amendment, however, does not govern the present case because it applies to applications for asylum filed on or after April 1, 1997. IIRIRA § 604(c), 110 Stat. 3009-694. The changes in asylum worked by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, Tit. IV, Subtit. C, § 421(a), 110 Stat. 1270, do apply to this case, because the AEDPA amendment governs asylum determinations made on or after the amendment's effective date of April 24, 1996. AEDPA § 421(b), 110 Stat. 1270. The AEDPA amendment, however, is not pertinent to petitioner's claim.

In addition, "if the Attorney General determines" that an alien's "life or freedom would be threatened" in the country of deportation "on account of race, religion, nationality, membership in a particular social group, or political opinion," the alien may be eligible for "withholding of deportation or return." 8 U.S.C. 1253(h)(1) (1994). To be entitled to relief under that provision, the alien must demonstrate a "clear probability of persecution." *INS* v. *Stevic*, 467 U.S. 407, 430 (1984); 8 C.F.R. 208.16(b) (applicant bears the burden of proof of eligibility for withholding). If the alien makes such a showing, withholding of deportation is mandatory. 8 U.S.C. 1253(h)(1).[3]

2. a. Petitioner is a native and citizen of Greece. Pet. App. 2. Petitioner arrived in the United States in 1983 on a non-immigrant student visa, which was later changed to a non-immigrant professional visa when petitioner obtained a teaching job. Petitioner's eligibility for that visa expired when he left the teaching job, but he failed to inform the Immigration and Naturalization Service (INS) of his changed status. *Ibid.*

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[3] IIRIRA substantially revised the INA's withholding-of-deportation provisions, see IIRIRA, Tit. III, Subtit. A, § 305, 110 Stat. 3009-602, which are now codified at 8 U.S.C. 1231(b)(3) (Supp. III 1997). IIRIRA does not govern the present case because its provisions apply only to withholding applications filed by aliens who are placed in proceedings on or after April 1, 1997. IIRIRA, Tit. III, Subtit. A, § 309(a), 110 Stat. 3009-625. AEDPA's changes in the withholding provision (see Pub. L. No. 104-132, Tit. IV, Subtit. B, § 413(f), 110 Stat. 1269-1270) do apply, because the Board's final decision was not issued until after AEDPA's date of enactment. See *id.* § 413(g), 110 Stat. 1269; see also *INS* v. *Aguirre-Aguirre*, 119 S. Ct. 1439, 1443 (1999). The AEDPA amendments, however, are not pertinent to petitioner's claim.

In October 1993, the INS commenced deportation proceedings against petitioner. Pet. App. 2; see also 8 U.S.C. 1251(a)(1)(C)(i). Petitioner conceded deportability, but sought asylum and withholding of deportation based on his opposition to Greece's compulsory military service requirement for all males between the ages of 18 and 50. Pet. App. 2. Petitioner claimed that, following his arrival in the United States, he developed a belief in "Objectivism," a philosophy espoused by the twentieth-century author Ayn Rand. One tenet of Objectivism is an opposition to forced military service, on the ground that the government lacks the authority to compel a citizen to place his life at risk. *Ibid.* Objectivism is not a pacifist ideology that opposes the use of violence; petitioner admits that "he would not object to serving *voluntarily* in the Greek military." Pet. 11.

The Greek government permits draftees who oppose military service to serve in non-combatant roles, albeit for twice the time commitment of routine draftees.[4] In addition, the Greek government offers an alternative civilian service for conscientious objectors that lasts from 12 to 18 months longer than combatant military service. Pet. App. 2-3. The conscientious objector exception, however, appears to be limited to those (unlike petitioner) who oppose the use of weapons. *Id.* at 3.

b. Following a hearing, the immigration judge found that petitioner had failed to demonstrate a well-founded fear of persecution on account of his race, religion, nationality, membership in a particular social group, or political opinion. The immigration judge concluded that any imprisonment petitioner might face upon his return to Greece would result from his refusal to comply with

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[4] Ordinarily, military service lasts for 24 months. Pet. App. 2.

Greece's universal military service requirement, and not because of his particular beliefs or views about that requirement. Pet. App. 3. The immigration judge accordingly denied petitioner's requests for asylum and withholding of deportation, but granted him voluntary departure to Greece. *Id.* at 3-4.

The Board of Immigration Appeals affirmed. Pet. App. 9-13. The Board explained that a government does not engage in persecution merely by requiring its citizens to perform military service. *Id.* at 10-11. Consequently, the Board continued, draft evasion does not give rise to a well-founded fear of persecution unless the failure to serve in the military would result in disproportionately severe punishment on account of a protected characteristic or the individual would be required to engage in inhuman conduct. *Id.* at 11 (citing *Matter of R-R-*, 20 I. & N. Dec. 547 (1992); *Matter of A-G-*, 19 I. & N. Dec. 502 (1987)). The Board concluded that petitioner failed to "establish[] that * * * any potential punishment could constitute persecution" or that "he will be disproportionately punished on account of one of the statutorily protected grounds for refusing to serve in the military." *Id.* at 10, 12.

3. The court of appeals affirmed. Pet. App. 1-8. The court agreed with the Board that "[i]t is not persecution for a government to require military service of its citizens." *Id.* at 5. The court explained:

> Nothing in the language of the federal definition of refugee (requiring persecution on one of the five enumerated grounds) suggests that it applies when a foreign country simply insists on universal military service for all citizens and provides no exemptions. In such a case, the resistor might refuse

> service out of religious or political conviction; but punishment for refusing to serve would not be "persecution" (even assuming [] that term is apt) "on account of" the objector's religious or political opinion, * * * but instead would be "because of his refusal to fight for the government."

Id. at 6 (citing *INS* v. *Elias-Zacarias*, 502 U.S. 478, 483 (1992)). The court of appeals found no evidence in the record that the Greek government had threatened petitioner with military service because he is an Objectivist. Nor was there evidence that the Greek government targeted Objectivists who refuse to serve for disproportionate punishment. Pet. App. 5. Further, the court rejected petitioner's claim that his imprisonment would represent disproportionate treatment because Greece allows only religious objectors and not secular Objectivists to qualify for the alternative civilian service. The court first observed that it was not clear why the alleged distinction mattered to petitioner, because he objected to *any* compelled government service, whether military or civilian. *Id.* at 7. Second, the court of appeals explained that the INA does not categorize as persecution every failure of a foreign government to construct its own draft laws to conform to the "highly complex equal protection jurisprudence" of the United States. *Id.* at 7-8. Noting that it was "doubtful" that the distinctions petitioner attributes to the Greek draft exemptions would be unconstitutional in this country, *id.* at 8 (citing *Gillette* v. *United States*, 401 U.S. 437, 446-448 (1971)), the court of appeals declined to categorize as "'persecution' a set of foreign-country exemption rules not all that different than our own." *Ibid.*

Finally, the court rejected petitioner's contention that the immigration judge demonstrated "bias" against him, concluding that the immigration judge had evinced only "annoyance" and "disagreement" with petitioner's arguments. Pet. App. 8.

ARGUMENT

1. Petitioner contends (Pet. 6-12) that the court of appeals erred in holding that substantial evidence supports the Board's rejection of his claim of persecution. That claim does not merit this Court's review. First, the task of determining whether an agency's decision is supported by substantial evidence belongs "primarily" to the court of appeals. "This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied." *Mobil Oil Corp.* v. *Federal Power Comm'n*, 417 U.S. 283, 310 (1974); see also *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951). That principle should apply with particular force when, as here, both levels of the administrative agency and the court of appeals concurred in their analysis of the record and their application of the governing law to the record.

Second, the record-bound and case-specific determination of whether petitioner's evidence demonstrated a clear probability of persecution presents no question of broad or recurring importance meriting this Court's review.

Third, the immigration judge, the Board, and the court of appeals all correctly determined that petitioner's evidence of persecution falls short of the mark. This Court held in *INS* v. *Elias-Zacarias*, 502 U.S. 478 (1992), that the consequences an individual faces as a result of resistance to military recruitment do not, by

themselves, establish a well-founded fear of persecution. *Id.* at 482-483. That is because such evidence leaves unanswered the question whether the individual is being persecuted because of a protected characteristic "rather than because of his refusal to fight." *Id.* at 483. Even supporters of a military organization, the Court explained, "might resist recruitment for a variety of reasons—fear of combat, a desire to remain with one's family and friends, a desire to earn a better living in civilian life, to mention only a few." *Id.* at 482.

Furthermore, an individual is a refugee only if he establishes a well-founded fear that he will be persecuted "on account of" his race, religion, nationality, membership in a particular social group, or political opinion. 8 U.S.C. 1101(a)(42)(A); see *Elias-Zacarias*, 502 U.S. at 482. Here, petitioner offered no evidence to support his claim that the Greek government would treat him differently than any other draft resistor because of his Objectivist beliefs:

> In this case, Greek law subjects all men to military service. There is no evidence that the Greek government has threatened [petitioner] with military service because he is an Objectivist, nor is there any evidence that the Greek government targets Objectivists who refuse to serve for disproportionate punishment.

Pet. App. 5. While petitioner claims that he would be ineligible for the two alternatives to routine military conscription, that does not change the fact that the motivation for the Greek government to punish petitioner would remain his failure to comply with the draft law, rather than his philosophical or political views. Moreover, the fact that the Greek government has adopted humanitarian alternatives to combat

service does not transform the consistently applied term of imprisonment for those who refuse service of any kind (see Immigration Judge Dec. at 10) into the type of persecution condemned by the INA.

2. Petitioner claims (Pet. 13) that the court of appeals' decision conflicts with the Ninth Circuit's decision in *Canas-Segovia* v. *INS*, 970 F.2d 599 (1992), because in the latter case, the court of appeals held that punishment for draft resistance could qualify as persecution, within the meaning of the INA, if the government falsely imputes a political opinion to the individual as a result of his refusal to join the military. *Id.* at 602. But that case is of no assistance to petitioner. Petitioner offered no evidence that the Greek government would falsely impute a political opinion to him as a result of his draft resistance. To the contrary, he repeatedly relies on his actual opinion regarding involuntary governmental conscription.

Petitioner also seeks review (Pet. 13-15) on the ground that the court of appeals failed to follow the United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (rev. ed. Jan. 1992) (Handbook), which leaves it "open to Contracting States[] to grant refugee status to persons who object to performing military service for genuine reasons of conscience." *Id.* para. 173, at 41. As the court of appeals explained, however, that discretionary language leaves it "to Congress to adopt that course, but it has not done so here." Pet. App. 7. In any event, the Handbook "is not binding on the Attorney General, the BIA, or United States courts." *INS* v. *Aguirre-*

Aguirre, 119 S. Ct. 1439, 1447 (1999); see also *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 439 n.22 (1987).[5]

3. Finally, petitioner claims (Pet. 15-18) that certain comments made by the immigration judge during his hearing violated the First Amendment's guarantee of freedom of conscience. The court of appeals properly rejected that claim, explaining that, while the immigration judge showed "considerable annoyance with [petitioner's] claims, * * * disagreement with [petitioner's] arguments is not proof of bias." Pet. App. 8. In any event, the necessarily record-bound determination of alleged individualized bias presents no question of broad or recurring importance that merits an exercise of this Court's certiorari jurisdiction.

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[5] Petitioner's additional contention (Pet. 14) that the court of appeals "mistakenly compared" Greece's draft law to that of the United States is also unavailing. The court of appeals simply made the unremarkable observation that it is highly unlikely that Congress would have intended sanctions permitted by United States law to constitute the type of persecution proscribed by the INA. See Pet. App. 8. Petitioner is simply wrong, moreover, in suggesting that the court's reference to United States law conflicts with the Ninth Circuit's mode of analysis. See *Canas-Segovia* v. *INS*, 902 F.2d 717, 723 n.11 (1990) ("United States jurisprudence is relevant to analysis of new issues of United States refugee law."), judgment vacated on other grounds, 502 U.S. 1086 (1992).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1999